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CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

ARTHUR W. IDE, CHARLES GRANT CALDWELL, H. B. LOOMIS, ET AL., APPELLANTS,
v.
THE UNITED STATES OF AMERICA.
No. 334.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit originated in a controversy over the construction of a drainage ditch on the Shoshone reclamation project in Wyoming. The questions of law for decision here relate mainly to the right of the government to recapture and use again seepage and surface waste escaping from reclamation homesteads, and its right to construct drainage ditches through private lands under general reservations of rights of way. There is also a mixed question of fact and law as to whether a certain draw or natural drainage way was a mere dry wash or a

natural stream whose waters were the proper subject of appropriation under the state laws.

The salient facts are as follows:

Shortly after the passage of the Reclamation Act of June 17, 1902, 32 Stat. 388, the government withdrew for reclamation purposes a large area of land along the Shoshone River. It thereafter initiated a water right and reservoir right of way under the state laws (R. 231, 241); commenced construction in due time; and, in 1908, began to deliver water to the reclamation farmers on Garland division, that being a large tract of land lying between the upper and lower portions of the project lands.

The Garland division was traversed by a draw or natural drain several miles long and known as Bitter Creek, which, as the government contends, was in its natural state a mere dry wash, without any living water at any time of the year, and serving merely to carry off surface waters at times of infrequent dashing rains. In 1909 and 1910, as a result of the use of government water on adjoining lands, waste water and seepage began to appear in this draw, so that it began to have a somewhat continuous and regular flow.

In the midst of the Garland division and traversed by this draw was school section 36 belonging to the state of Wyoming.

The defendant, Charles Grant Caldwell, acquired from the government a reclamation homestead which adjoins the school section on the west. His

rights thereto were initiated in 1910, and the land has been watered from government ditches ever since. He established his residence on this land in April of that year (R. 291). On June 16 following he purchased from the state eighty acres of the school section immediately adjoining his homestead on the east. Shortly afterwards he assigned the certificate of purchase to his wife and the land was patented to her by the state in 1918 (R. 263). In 1911 Caldwell acquired immediately from the state some additional land in the southeast corner of the school section and secured a state patent in 1918. The defendant, Arthur W. Ide, acquired from the government, about 1913, a reclamation homestead immediately adjoining the school section on the east. His land is irrigated from the government laterals. Other lands in the school section were purchased from the state in 1911, patented June 11, 1918, and are now owned by other parties who are appellants here.

The reclamation homesteads owned by defendants Ide and Caldwell, and the portions of the school section owned by Caldwell and his wife and the intervening defendant Althoff, are traversed by Bitter Creek. The homestead lands were patented under the Reclamation Act, and contained express reservations to the United States of rights of way for "canals and ditches constructed, or to be constructed by its authority," as directed by the Act of August 30, 1890, 26 Stat. 391. (R. 228, 230.) All the school lands were patented by the state expressly

"subject to all legally established or granted rights of way under the laws of the state of Wyoming *or reserved* to the United States," etc. (R. 260, 262, 263, 264.)

After seepage and waste water from project lands irrigated with government water had produced a continuous and regular flow in Bitter Creek, and on December 31, 1910, the United States applied to the State Engineer of Wyoming for permits to take this water by ditches from Bitter Creek for the purpose of irrigating additional project lands; but these applications were denied August 5, 1912, on the ground that the lands in question were already covered by the permit under which the government made its diversion from the Shoshone River for the whole project (R. 254–259). Before this, however, and on June 6, 1910, defendant Caldwell had applied to the State Engineer for permits to take water from Bitter Creek through two ditches and the same had been granted October 6, 1910 (R. 361–366).

The two Caldwell ditches were constructed; other owners of lands in the school section secured permits for water from Bitter Creek to be taken out through the Caldwell ditches (R. 367, 371, 376, 377, 378, 379, 381 and 382); and for some years, beginning in 1911, practically all the school section lands were irrigated through the Caldwell ditches with waste and seepage water flowing down Bitter Creek, without any compensation to the United States. According to the testimony of the defendants themselves, the value of

the lands was increased thereby from practically nothing to $250 per acre.

Early in 1910, the government began to consider measures for draining the seeped lands of the Garland division and recapturing the seepage and waste waters for use on other project lands. The natural and only feasible line of drainage for this area was along the line of the depression occupied by Bitter Creek. The drainage plans were formulated in 1911–1912 (R. 162, 171). In order to get the proper outlet for tributary drains from seeped lands on either side, it was found necessary to deepen the bed of Bitter Creek, and this work was commenced in 1914 far below the lands of the appellants, and up to 1918 the work had been completed for some two miles westward to the vicinity of the Ide and Caldwell lands (R. 182). Work was resumed in 1918 and notice was given Ide and Caldwell. These parties, however, interposed active resistance to officers and employees of the Reclamation Service, and this suit was commenced by the United States to enjoin them from interfering with the further progress of the work. The original defendants were Ide, Caldwell and H. B. Loomis. Ide and Caldwell filed separate answers and cross-bills; both moved to dissolve the injunction. Prior to the hearing on these motions, the government entered into a stipulation with defendand Caldwell to the effect that if upon final hearing it should be found that Caldwell was entitled to damages because of plaintiff's acts plaintiff would either pay him such damages or deliver to him such

amount of water as he was found entitled to receive (R. 60). The motions to dissolve the injunction were then overruled (R. 61).

An order was then made granting Christopher Althoff and others, appellants here, leave to intervene, and thereupon he and the other owners of school lands watered from the Caldwell ditches filed separate answers, with cross-bill features, and the pleadings were perfected.

The work of deepening Bitter Creek was then finished through and beyond the Ide and Caldwell lands. The channel was cut out to such depth as to prevent the passage of water into the two Caldwell diversion ditches.

Evidence was then taken, the cause was heard, and the court filed an opinion, holding that Bitter Creek was a natural stream; that the United States had no rights of way which would entitle the reclamation officials to go upon the lands of Ide and Caldwell and "make such excavations as the testimony shows were made in this case" (R. 104); that the government had no right as against the defendants to reclaim seepage and waste waters in Bitter Creek; and, in any event, had abandoned them; that lands of the school section were worth $150 per acre as irrigated from Bitter Creek through the Caldwell ditches, and were worthless without water; and that under the stipulation the government would be liable to the defendants for the full value of the lands unless it elected to furnish them water according to their appropriations from Bitter Creek in lieu of compen-

sation for the destruction of their water rights. The court also found that by the excavations and the dumping of material on the banks the government had destroyed the entire value of a limited number of acres belonging to several of the defendants respectively and must compensate them accordingly (R. 103–108). A decree *nisi* was entered embodying these findings and conditions (R. 108). The government thereafter filed its election declining to avail itself of the alternative offered; the decree was therefore made final (R. 112) and the government appealed.

The Circuit Court of Appeals overruled the District Court on all the propositions of law and fact, reversed the decree, and directed a decree in favor of plaintiff "as prayed," 277 Fed. 373. (R. 406.) The defendants and interveners bring the cause to this court.

ARGUMENT.

I.

Bitter Creek is not and never was a natural stream.

The testimony as to the character of the draw or dry wash known as Bitter Creek was extensive. The District Court held that it was a natural stream (R. 103). The Circuit Court of Appeals (three judges sitting) declared with emphasis that it was not and never had been a natural stream (R. 395, 401). It would serve no good purpose to analyze the evidence of particular witnesses. The map at page 253 of the record, being plaintiff's exhibit 8–A, shows the whole reclamation project. The area now irrigated

is designated as the Garland division. The eastern portion thereof is spoken of generally as Garland Flat, and the town of Garland lies in the midst of it. Further westward is what is called Powell Flat, and the town of Powell is situated therein. Bitter Creek or draw has its beginnings on the northwestward at the eastern edge of what the witnesses called "the bench," which has an elevation of some four hundred feet above the irrigated area. There are two branches of Bitter Creek; one from the northward and the other from the westward. They unite on the Caldwell lands some three miles west of the town of Garland and the course is then southeastward to and through the Garland town-site and on to the Shoshone River just east of the irrigated area. The total length, including the branches more or less indefinite, is something like 12 or 15 miles. The drainage area above the Caldwell lands is about 33 square miles. From Garland town-site eastward all the witnesses agree that the draw has a well defined channel several feet deep and 12 to 15 feet wide in some places. It also has a well defined channel, according to most of the witnesses, some three miles or more west of the Garland town-site, which is near the place where the two branches unite. Further west it is quite well defined at places and indefinite at others.

According to records kept at Powell by the Reclamation Service for the past twelve years, the total annual precipitation, including snow, is 5.9 inches per annum (R. 140). The annual evapora-

tion is over 30 inches per annum (R. 143, 174). During the summer months there are occasional local rains of a cloudburst character in different parts of the project. These storms sometimes cause a run-off lasting a day or less; and there is no doubt that Bitter Creek, so far as it had a channel, was made by the run-off from these occasional heavy storms. In 1918 there were two rains of a more general character; in one, the rainfall was 1.05 inches and in the other 1.17 inches. By accurate measurements the first affected the run-off of Bitter Creek for 20 hours and the second for 29 hours (R. 216).

All the witnesses agree that in its natural state there were no trees, no grass, and no other vegetation along the banks of the creek such as are present along all natural running streams in that region, as elsewhere; that no springs deliver water to it; that the occasional rains and early melting snows are the only sources of supply. Sixteen government witnesses, thoroughly familiar with this creek or draw from 1900 and 1901, say there was never any water running in it from melting snow except upon rare occasions when there were hot winds in March or April. A number of witnesses for the defendants say there is more or less running water from melting snows every spring during March and April. No witness claims that, before government irrigation commenced, there was any water in the creek after May first except from occasional heavy rains. The

irrigation season begins on April 20th, so that the snow run-off, if any such there is, is of no practical use for irrigation purposes.

The defendant Caldwell testified for the defendants, and the District Court especially relied upon his testimony, saying that he was an eminently fair witness. Caldwell, however, never saw Bitter Creek until March, 1910, and only became a resident of the vicinity in April, 1910, when he took up residence on his homestead (R. 291). At that time seepage from the government irrigation had already begun to appear in many places, the water table of the lands bordering Bitter Creek had been raised several feet; and seepage no doubt played some part in the spring even though the water had been shut off from the government laterals during the winter. The substance of the evidence is well summarized by the Circuit Court of Appeals in its statement of facts (R. 400). That court's conclusions are stated as follows (R. 401):

> Upon the first proposition we are of the opinion that the evidence falls far short of showing Bitter Creek ever to have been a natural stream. No one prior to the time that water first commenced to run in the Creek as the result of the construction of the Shoshone Project ever applied for a permit to use any of the water of the Creek, and there is no substantial conflict in the testimony to the effect that there was no water in the Creek after the first of May, and that the irrigation season did not commence until

> April 20th of each year. The substance of what the evidence shows has been set forth in the statement of facts, and we are of the opinion that it would be a clear mistake in considering the evidence to hold that Bitter Creek is or ever was a natural stream. The trial court found that it was a natural stream. We think the presumption attending such finding is clearly overthrown by the evidence and we must hold that there was a serious mistake made in the consideration of the evidence by the trial court upon this point.

The court's conclusions both of fact and law are fully justified and required by the record and the authorities.

Of course, no definition of a natural stream is or can be complete and applicable under all circumstances. The necessary elements, however, were well stated in *Barkley* v. *Wilcox*, 86 N. Y. 140, 143, as follows:

> A natural water-course, is a natural stream flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a water-course, that the flow should be uniform or uninterrupted. The other elements existing, a stream does not lose the character of a natural water-course, because in times of drought, the flow may be diminished or *temporarily suspended*. It is sufficient if it is *usually a stream of running water*,

citing *Angell on Water Courses*, §4; *Luther* v. *Winnisimmet Co.*, 9 Cush. 171.

A defined channel and banks, in places, do not alone make a natural stream. It is common knowledge, particularly in the arid regions of the west, that a more or less well defined channel may be caused solely by heavy downpours of rain occurring at rare intervals through a long series of years. But this is not enough.

> There must, however, always be substantial indications of the existence of a stream, which is *ordinarily* and most frequently a moving body of water.
>
> *Weis* v. *City of Madison*, 75 Ind. 241, 253.

> There must be a bed and banks and evidences of a permanent stream.
>
> *Rice* v. *City of Evansville*, 108 Ind. 7.

In a case often cited, Brewer, J. (afterwards a justice of this court), said:

> It matters not what the width or depth may be, a water course implies a distinct channel, a way cut and kept open by running water, a passage whose appearance, different from that of the adjacent land, discloses to every eye on a mere casual glance the *bed of a constant or frequent stream*.
>
> *Gibbs* v. *Williams*, 25 Kans. 214 (citing *Swett* v. *Cutts*, 50 N. H. 439; *Ashley* v. *Walcott*, 11 Cush. 192; *Hoyt* v. *City of Hudson*, 27 Wis. 664; *Angell on Water Courses* (5th ed.), §4; *Barnes* v. *Sabron*, 10 Nev. 217.)

The foregoing statements of the law and its application by the Circuit Court of Appeals to the facts shown regarding Bitter Creek are abundantly supported by the following additional authorities:

Pyle v. *Richards*, 17 Neb. 180; *Sanguinetti* v. *Pock*, 136 Cal. 466; *Hutchinson* v. *Watson Sloug Ditch Co.*, 16 Idaho 484; *Rait* v. *Furrow*, 74 Kans. 101; *Thorpe* v. *City of Spokane*, 78 Wash. 488; *Chicago R. I. & P. R. Co.* v. *Morton*, 57 Okla. 711; *Neal* v. *Ohio River R. Co.*, 47 W. Va. 316; *Simmons* v. *Winters*, 21 Ore. 35; *Hawley* v. *Sheldon*, 64 Vt. 491; *Singleton* v. *Railway Co.*, 67 Kans. 284; *1 Kinney on Irrigation* (2d ed.), pp. 495–6, 498–9.

The main injury here set up by defendants is the destruction of an alleged water right for irrigation purposes, and it is from that standpoint that the question of the existence of a natural stream is to be viewed. And the facts appearing are that in its natural state this creek carried no water available or useful to that end, because the snow waters, if any there were, ceased to flow about the time the irrigation season opened, and the summer storm waters were so infrequent and passed so quickly, that they were wholly valueless as a supply for irrigation. There was no available reservoir site to catch the storm waters, even if they were sufficient in quantity to be valuable for irrigation purposes (R. 151).

The state could not, of course, make this a natural stream by issuing permits to take water from it. *United States* v. *Ramshorn Ditch Co.*, 254 Fed. 842, 850, and 269 Fed. 80; *Wattson* v. *United States*, 260 Fed. 506; *Vanderwork* v. *Hewes*, 15 N. Mex. 439; *Basinger* v. *Taylor*, 30 Idaho 289.

In very truth the defendants, under the guise of a permit to take water from a natural stream, sought to appropriate to their own use without compensation the waste and seepage waters discharged into a dry wash from lands of the reclamation project.

II.

The United States has a reserved right of way for the drainage ditch: (a) through the homestead lands of Ide and Caldwell under the act of August 30, 1890, 26 Stat. 391; (b) through the school lands of Caldwell and others, under the Wyoming act of February 21, 1905 (Comp. Stat. Wyo., 1910, § 3890).

A.

Fourteen years before the passage of the Reclamation Act (June 17, 1902, 32 Stat. 388), Congress took its first official action looking to the reclamation by the government of its arid lands in the west. On March 20, 1888, 25 Stat. 618, a joint resolution was passed directing the Secretary of the Interior, through the Director of the Geological Survey, to make an investigation—

> of that portion of the arid regions of the United States where agriculture is carried on by means of irrigation, as to the natural advantages for the storage of water for irrigating purposes with the practicability of constructing reservoirs, together with the capacity of the streams and the cost of construction and capacity of reservoirs, and such other facts as bear on the question of storage of water for irrigating purposes; and that he be further directed to report to Congress as

> soon as practicable the result of such investigation.

Later, in the same year (October 2, 1888, 25 Stat. 526), Congress appropriated $100,000 for carrying on these investigations and further provided that—

> all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law.

On May 24, 1890, William H. Taft, acting Attorney General, gave an opinion (19 Op. 564) holding that it was the manifest purpose of Congress to suspend all rights of entry upon any lands—

> which would come within the improving operations of the plans of irrigation to be reported by the Director of the Geological Survey under this act,

and advising the Secretary that—

> Entries should not be permitted, therefore, upon any part of the arid regions which might possibly come within the operation of this act.

The refusal of the Secretary of the Interior to patent lands or permit entries over large areas indi-

cated and segregated by the Geological Survey gave rise to much contention and discussion in Congress, and finally resulted in the Act of August 30, 1890, 26 Stat. 391. This legislation provided that entries made in good faith before the Act of 1888 might be perfected—

> except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location of selection thereof.

This was followed by the proviso reserving rights of way, as follows:

> Provided, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States.

It is manifest that these reservations were made with a view to future legislation for the reclamation of public lands by the government itself.

The foregoing legislation has been before the courts in but three reported cases, namely, *Green* v. *Willhite*, 160 Fed. 755, decided by Beatty, District Judge for the district of Idaho, October 31, 1906;

Green v. *Wilhite*, 14 Idaho 238, decided February 7, 1908; *United States* v. *Van Horn*, 197 Fed. 611, decided June 12, 1912, by Lewis, District Judge for the district of Colorado. All the decisions fully sustained the right here claimed by the United States.

In the first case above cited, the main objection made was that the language "ditches or canals constructed by the authority of the United States" included only rights of way for ditches and canals *theretofore* constructed. The court, however, showed that the only practical application the statute could have was a prospective one, and said that the act "clearly shows that the intention was to include canals *to be constructed* by the government in its irrigation scheme." In reaching this conclusion the court said (p. 757):

> The acts referred to show that the Congress had been contemplating a system of government irrigation of the arid lands of the west which would require reservoirs and a canal system and which should be under the direct management and control of the government. We know that often in such matters the government moves slowly, and takes its preliminary steps and discussions long before it finally puts the chief work into operation.

In the case decided by the Supreme Court of Idaho the same objection was made, and it was further contended that the act was void for indefiniteness because the route of the right of way reserved was wholly left to future ascertainment and designation. Both objections were overruled. In the course of

the opinion the court sets forth very fully the legislative history of the legislation in question, and says (14 Idaho 238, 246):

> The Congress was taking this precautionary measure for the protection of a right of way to the government in the event it should later adopt a reclamation policy and enter upon such works. It intended thereby to save the government from the expense of purchasing and condemning rights of way when it got ready to construct any canal or ditch.

The same objections were made in *United States* v. *Van Horn, supra*, and all were overruled by the court. It is unnecessary to add to these discussions.

B.

The legislatures of various states in the arid regions were also looking forward to the irrigation of lands within their borders by the government, and, evidently for the purpose of encouraging the United States to undertake irrigation works, statutes were passed granting rights of way over state lands in substantially the language of the federal statutes above discussed. Such acts were passed in 1905 in Idaho, Montana, Nebraska, Nevada, Oregon, Utah, Washington and Wyoming; in 1907 in California, New Mexico and South Dakota; and in 1909 in Colorado.

The Wyoming statute, passed February 21, 1905 (Laws 1905, p. 134; Comp. Stats. 1910, §3890), provided:

> There is hereby granted over all the lands now owned by the state of Wyoming, which

> may hereafter be owned by the state of Wyoming, a right of way for ditches, tunnels, telephone and transmission lines constructed by and under the authority of the United States: Provided, always, That any such right of way desired by the United States shall be surveyed and platted and certified maps and plats of such right of way filed with the Secretary of State and with the State Board of Land Commissioners having control of any such said lands, such maps and plats to be in conformity with the requirements of section 3207 of the Revised Statutes regarding rights of ways for railroad corporations, and no fee shall be required for the filing of any such said maps and plats; and, Provided, further, That all conveyances by the state of any of its lands, which may hereafter be made, shall contain a reservation for rights of way provided for in this act.

The state of Wyoming was the proprietor of the school section for many years after the above statute was enacted. It made sales to Caldwell and others, beginning in 1910, and each of the patents issued contained the following:

> Subject to all legally established or granted rights of way under the laws of the state of Wyoming or reserved to the United States.

The proviso requiring the filing of plats of the surveys of the right of way in the state offices "having control of any such said lands" did not, of course, apply, because the land had passed out of the control of the state at the time the government surveyed

and located its ditch right of way. However, the Reclamation Service sought to comply with this provision, and to that end gave notice of its intention to occupy a right of way through the former school lands and filed the appropriate papers with the proper officers of the state.

It is entirely clear that the Wyoming statute is fully as broad as the federal statute and must receive the same construction. Indeed, so far as one of the main contentions is concerned, it is even more definite in that it expressly contemplates the granting of rights of way over lands "which may hereafter be owned by the state," etc.

III.

The United States may construct drainage canals as a part of its irrigation system.

The original reclamation act does not expressly authorize the construction of drainage ditches as distinguished from diversion and supply ditches; but drainage ditches, especially on large irrigation projects, are almost as necessary as the supply ditches themselves. In nearly all projects of any considerable size it is the rule rather than the exception that portions of the land become water-logged and worthless without drainage. The necessity for drainage ditches as a part of irrigation projects has been recognized by a number of decisions. *Bissett* v. *Pioneer Irrigation District*, 21 Idaho 98; *Pioneer Irr. District* v. *Stone*, 23 Idaho 344; *Burt* v. *Farmers' Cooperative Co.*, 30 Idaho 752; *Nampa and Meridian District* v. *Petrie*, 28 Idaho 227.

Prior to 1915 the drainage work on the Shoshone and other projects was done under the general authority of the original reclamation act. On August 13, 1914, an act was passed (38 Stat. 686, 690) providing that—

> Expenditures shall not be made for carrying out the purposes of the reclamation law except out of appropriations made annually by Congress therefor,

and the Secretary was required to submit estimates of the amounts needed for the various purposes. After July 1, 1915, the drainage work on the Shoshone project was continued with moneys appropriated on specific estimates. The total expenditures for drainage on that project amounted at the time the evidence was taken to over $500,000 (R. 153).

IV.

The necessity for drainage and the means and methods of achieving it are in the sound discretion of the Secretary of the Interior which cannot be reviewed by the courts.

An attempt was made below to prove that a drainage system was not necessary for reclaiming the Shoshone project lands, and that the deepening of Bitter Creek was unnecessary and the plans faulty and inadequate. In fact, the plans were made with the utmost care and by engineers experienced and expert in drainage engineering (R. 180).

There can be no doubt that the decisions of an executive officer as to the means, methods and plans

for developing and draining a reclamation project belong to that class of functions which involve the exercise of judgment and discretion which may not be reviewed by the courts. *Ness* v. *Fisher*, 223 U. S. 691; *Knight* v. *U. S. Land Ass'n*, 142 U. S. 161; *Noble* v. *Union River Logging Co.*, 147 U. S. 165; *United States* v. *Minidoka & S. W. R. Co.*, 190 Fed. 491; *Stalker* v. *Oregon Short Line*, 225 U. S. 142.

This does not mean, of course, that the reclamation officers may construct a ditch in a reckless and careless way so as unnecessarily to damage the lands of the defendants. Some attempt was made to show that the dirt removed from the channel was piled upon the banks in a careless and unworkmanlike manner so as to throw back surface waste upon the lands of the defendants and impair their value. It was shown by the government, however, that openings were left in the spoil banks where surface waste could be returned to the deepened channel and that wooden chutes were constructed through which water could be dropped back without washing or eroding the sides of the banks; and that means have been provided on practically all farms for affording access for stock to Bitter Creek (R. 178).

The reserved right of way for a ditch would include the right to pile earth along the sides of the ditch. In any event, the Circuit Court of Appeals expressly declared that its decision was without prejudice to the right of the defendants to recover for any damages resulting from the want of ordinary care in performing the work (R. 404).

V.

The government has a right to recapture, within the boundaries of the project, surface waste and seepage waters for use upon other project lands.

As between the owners of isolated tracts of land, it may be true that the use of water by one appropriator for the actual irrigation of his own lands exhausts his right and he cannot recapture seepage and waste waters for further use unless he does so before they leave his own land, or at least before they find their way into a natural stream.

But in large irrigation projects like those of the government, the appropriation is made, not for specific tracts occupied by particular farmers within the project, but for the project as a whole and all the lands within it. The scheme always contemplates progressive development, and there is always need for the use of all water available. The fact that the government sells to individual farmers within the area first developed rights to the use of specific quantities of water for the irrigation of their individual tracts, does not at all indicate that the government has no further interest, concern or right in the waste and seepage waters. The situation calls for the development and recaption of all seepage and waste waters and their use upon other lands within the project until all the project lands are supplied. Otherwise, as would happen here, the owners of lands within the project might supply themselves with water furnished at the government expense,

without paying any charges or rentals, whereby the reclamation fund may be reimbursed as contemplated by the reclamation act.

The right of recaption of seepage and waste water has accordingly been upheld in a number of recent cases involving situations similar to that of a large government project. *Ramshorn Ditch Co.* v. *United States*, 269 Fed. 80, 83 (C. C. A.); *Griffiths* v. *Cole*, 264 Fed. 369, 372 (U. S. D. Ct. Idaho); *McKelvey* v. *North Sterling Irr. Dist.*, 66 Colo. 11; *Hagerman Irr. Co.* v. *East Grand Plains Drainage Dist.*, 25 N. Mex. 649; *Lambeye* v. *Garcia*, 18 Ariz. 178.

In the *Ramshorn* case, *supra*, the facts were very similar to those in the case at bar. The government appropriated waters of the North Platte River for the North Platte project, which comprised lands lying partly in Wyoming and partly in Nebraska, reservoired the waters in Wyoming, and brought part of them into Nebraska by the Interstate Ditch. In Nebraska, the main ~~channel~~ canal made a loop around the head of two little valleys. Neither valley, as the court found, had in it a natural stream. These valleys were irrigated from the government canal, and a year or two later seepage began to appear and collect in pools, and gradually began to cut channels from one pool to another. The government then collected these waters by drainage ditch, delivered them into the ditch of a drainage district, whereby they were for a time conducted back to the Platte River, the government sharing the expenses of the drainage district. Later, the government entered

into an arrangement with the owners of the Farmers Ditch, which crossed the drainage ditch, whereby the waters in the drainage ditch were taken into the Farmers Ditch for the irrigation of lands lying thereunder. This use continued for some two years, when the Ramshorn Ditch Co., having secured a sort of qualified permit from the state board, caused the water to be shut out of the Farmers Ditch and returned to the drainage ditch, whence it was diverted into the Ramshorn Ditch. In that case the seepage waters were comprised in part of seepage from the government's main and lateral canals and in part of seepage from the irrigated project lands. Both the District Court and the Circuit Court of Appeals held that the government had a right to collect both kinds of seepage and use them in the irrigation of other lands. The opinions are well considered and review the authorities at length.

Griffiths v. *Cole*, *supra*, deals solely with seepage from project lands irrigated with government water. The plaintiff had secured state authority to divert and use these waters, but had not yet applied them or secured the rights of way for his ditches. He sought to enjoin the reclamation officials from collecting these waters for use on private lands *outside the project*. Because the plaintiff was not then prepared to use the water, the court did not formally and finally pass upon the legal rights of the parties; but nevertheless expressed the clear opinion that the government had the superior right.

McKelvey v. *North Sterling Irr. Dist., supra,* involved only seepage from the supply ditch of the irrigation district. McKelvey had actually taken and used this seepage; and in Colorado such actual diversion and use constitutes an appropriation. He later filed a map and statement with the State Engineer, and on the same day the irrigation district also filed a map of survey for a ditch to catch this seepage water, and thereafter sued to enjoin McKelvey's diversion. The court said (p. 14):

> Clearly water once lawfully in plaintiff's possession, may, in the absence of an intent to abandon, be prevented from escaping, or may be recaptured while escaping.

In *Hagerman Irr. Co.* v. *Drainage Dist., supra,* it appeared that the drainage district was organized to drain the lands within its limits, and that the drainage waters were for a time discharged into the canal of the irrigation district, and for one year were leased to that district. The drainage commissioners then conceived the idea of conveying the waters across the irrigation canal and selling them to other parties. The suit was brought to enjoin them from carrying out this plan. The court held that the irrigation company had acquired no right to the waters and that the drainage company could dispose of them as it saw fit.

The decision in *Lambeye* v. *Garcia,* 18 Ariz. 178, is concretely expressed in the second paragraph of the syllabus as follows:

> A prior appropriator whose waste water plaintiff formerly used joined in a government

project, whereby he was supplied with water and subscribed to a corporation distributing the water under a new system of canals. The corporation managing the canals contemplated no waste water and proceeded by making new laterals, to collect all waste water and use it upon lands situated below. *Held*, that plaintiff could not restrain the corporation from diverting the waste water from his premises; for he had no vested rights in the waste water, and it was within the power of the irrigation company to conserve such water, though it was not personally recaptured by the appropriator from whose land plaintiff originally received it.

The court said (p. 184):

> It would seem to us that members and stockholders of the western canal system are acting within their rights in the execution of their plan to conserve all of the water for the use of its membership by preventing strangers from capturing and appropriating water commonly known as surplus or waste water, and that the appellee's act, of which complaint is made, was violative of no right of the appellant.

See *Twin Falls Canal Co.* v. *Damman*, 277 Fed. 331.

VI.

The government never abandoned the seepage and waste waters.

Any contention that the government had abandoned the waste and seepage waters passing into Bitter Creek is utterly unreasonable in view of the facts.

It is common learning that abandonment of water or water rights is always a question of intent; that the intent is usually to be gathered from the circumstances; that mere nonuse is not sufficient evidence of intent to abandon, unless continued for many years; and that the burden of showing abandonment is on him who alleges it. *Cf. Wright-Blodgett Co.* v. *United States*, 236 U. S. 397.

In this case seepage and waste waters began to appear to some extent in 1909. In 1910 an express intent to recapture and use them again was evidenced by the report of the board of engineers appointed by President Taft to inspect the reclamation projects and make recommendations (R. 168), and by the annual reports of the Reclamation Service, beginning with that for the years 1912–13 and repeated in those succeeding it and covering the years up to 1917 (R. 168, 169). We have already shown that the reclamation engineers began to consider plans of drainage and recaption in 1910; that they perfected plans in 1911–12, and actually deepened the channel of Bitter Creek for these in 1914–15 nearly up to the lands of the defendants.

A Wyoming statute, however, provides (Comp. Stat. 1910, §741):

> Rights to the use of water shall be limited and restricted to so much thereof as may be necessarily used for irrigation or other beneficial purposes as aforesaid, irrespective of the carrying capacity of the ditch, and all the bal-

> ance of the water not so appropriated shall be allowed to run in the natural stream from which such ditch draws its supply of water, and shall not be considered as having been appropriated thereby; and in case the owner or owners of any such ditch, canal, or reservoir shall fail to use the water therefrom for irrigation or other beneficial purposes during any five successive years, they shall be considered as having abandoned the same, and shall forfeit all water rights, easements, and privileges appurtenant thereto, and the water formerly appropriated by them may be again appropriated for irrigation and other beneficial purposes, the same as if such ditch, canal, or reservoir had never been constructed.

It is apparent that this statute applies only to supply ditches and to waters which they take, or are capable of taking, from the source of original supply. Its language does not either directly, or by reasonable implication, apply to seepage and waste waters from irrigated lands. The defendants themselves evidently took this view at the hearings below, for they did not even refer to this statute in their brief.

In any event, the enactment, if applicable to seepage and waste waters, is obviously in the nature of a statute of limitations, operating to terminate or divest a right, or to take away a remedy, and would therefore be inoperative as against the United States. And even if it were held to apply, the government actually constructed a portion of the

works designed to recapture the waters here in controversy before the five years expired, for it deepened a large part of the channel in 1914 and 1915.

CONCLUSIONS.

All the school lands are irrigable from the existing government laterals, with water from the main canal, and the defendants have only to apply for the water and assume their share of the project costs and burdens (R. 183). The duty of water on this project is about 2 acre feet per annum. In the height of the irrigation season the waste and seepage water flowing down the deepened channel of Bitter Creek is about 100 second-feet (R. 154). Of course, the waste and seepage is much less in the earlier and later portions of the season, but it is apparent that the recaptured water will irrigate some thousands of acres; so that if the law requires that the natural conditions should be maintained in order that the defendants may continue to irrigate without cost the 640 acres of the school section, it means a loss of irrigating capacity for the system of several thousands of acres.

The whole tendency of legislation and of judicial decision is to follow and control the use of water through all its applications and to require that it shall be so conserved and used as to produce the greatest possible economic benefit. We can not believe that the existing state of the law requires so great a loss of beneficial use as the foregoing estimates indicate.

The decree of the Circuit Court of Appeals should be affirmed.

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